DOCUMENT RESUME

ED 448 490 CS 510 489

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TITLE Kincaid v. Gibson: Hazelwood Goes to College.
PUB DATE 2000-11-00
NOTE 11p.; Paper presented at the Annual Meeting of the National Communication Association (86th, Seattle, WA, November 9-12, 2000).
PUB TYPE Information Analyses (070) -- Speeches/Meeting Papers (150)
EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Academic Freedom; *Court Litigation; *Freedom of Speech; High Schools; Public Schools; Scholastic Journalism; State Colleges; *Student Publications; *Student Rights
IDENTIFIERS Case Law; First Amendment; Hazelwood School District v Kuhlmeier; Legal Research; Supreme Court

ABSTRACT

The purpose of this paper is threefold: first, it reviews the Supreme Court decision in "Hazelwood," one of the prime cases in reducing student speech rights; next, it looks at the legal history of "Kincaid," a series of cases that appears to be on the verge of applying the restrictions on high school student speech announced in "Hazelwood" to college and university students; and finally, it looks briefly at a separate series of cases, "Urofsky," that are creating restrictions on faculty expression at state college and universities. Overall, the tone and message of the paper is that courts are appearing more and more willing to restrict expression rights in deference to the wishes of majorities, embodied as school authorities at the high school or college level, or legislatures at the college and university level. (Contains 19 references.) (NKA)

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"Kincaid v. Gibson: Hazelwood Goes to College."

Paper presented at the 2000 National Communication Association Convention

Seattle, WA

November 8-12

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The purpose of this essay is three-fold. First, I will review the Supreme Court decision in *Hazelwood*, one of the prime cases in reducing student speech rights. Next I will look at the legal history of *Kincaid*, a series of cases that appears to be on the verge of applying the restrictions on high school student speech announced in *Hazelwood* to college and university students. Finally, I will be briefly looking at a separate series of cases, *Urofsky*, that are creating restrictions on faculty expression at state colleges and universities. Overall, the tone and message of this essay is that courts are appearing more and more willing to restrict expression rights in deference to the wishes of majorities, embodied as school authorities at the high school or college level, or legislatures at the college and university level.

Hazelwood

On January 13, 1988, the United States Supreme Court handed down its decision in the case of "Hazelwood School District et. al. *v.* Kuhlmeier et.al.". In a 5-3 decision, the Supreme Court held that:

> First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission. . . (Hazelwood, 260).

The case involved the school district and the principal, Robert Reynolds, of Hazelwood East High School in Hazelwood, Missouri, and the former student staff members of the school newspaper, Spectrum, Cathy Kuhlmeier, Leslie Smart, and Leanne Tippett-West. On May 10, 1983, the faculty advisor for the student newspaper, Howard Emerson, presented the page proofs of the May 13 edition of the paper to principal Reynolds. No formal policy for prior review was in place; however, it had become common practice for the principal to review the paper prior to publication. Two articles in this edition of the paper caught Reynold's attention. The first dealt with the experiences three Hazelwood students had with teenage pregnancies. The second dealt with the impact of a parent's divorce on a student. Reynolds deemed that both the content and the manner in which the articles were written made them inappropriate for publication. Acting with the advice of Emerson, Reynolds removed the two pages of the paper which contained the offending articles. Reynolds acted in the belief that the pages could not be rewritten without the offending articles in time to meet the publication deadline.

After the removal of the two pages took place, the students went to former advisor Robert Stergos for advice (Visser, 442). He told them to take their case to the American Civil Liberties Union. The ACLU agreed to take the case. The first court ruling, delivered in May of 1985 by Judge John F. Nangle, declared that ". . . no constitutional violation had occurred" (Palermo, 44-45). Nangle added that the school district and its officials had "merely exercised their discretion, in a proper manner, with respect to a product of Hazelwood East curriculum" (Uhlig, 105). The students and the ACLU appealed the case to the Eighth Circuit Court of Appeals, which reversed the District Court. The decision by the appellate court determined that the school newspaper was a "public forum" and therefore did not meet the case for prior restraint determined in a previous Supreme Court

decision, that of Tinker versus Des Moines. In Tinker, the Supreme Court found that, in the well-known phrase, public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (393 U.S. 506). The Hazelwood School District filed an appeal of the 2-1 decision of the Eighth Circuit Court. The appeal was granted by the Supreme Court. The Supreme Court, in its 5-3 decision, determined that the school district and Reynolds acted reasonably and within constitutional guidelines in deleting the two pages of the newspaper.

The Majority Decision

The arguments in the majority decision begin by reaffirming the First Amendment rights of students as determined in Tinker. The Court ruled in Tinker that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (506). The Court immediately goes on to qualify this statement, citing Tinker once again. Free expression is allowable, so long as school authorities believe that it will not "substantially interfere with the work of the school. . ." (509). The Court continues its definition of free expression by students with a citation to another Supreme Court decision, Bethel School District v. Fraser: "A school need not tolerate student speech that is inconsistent with its 'basic educational mission' (Bethel, 685) even though the government could not censor similar speech outside the school" (Hazelwood, 266).

After setting this groundwork for its discussion of Hazelwood, the Court began to deal with the specifics of the case. The first major legal issue dealt with in the majority decision is whether or not the Hazelwood school paper was considered a "forum for public expression". The issue of public forum is important legally. If the newspaper had been considered to be a public forum, the school district would not have been within its legal right to censor student expression since the school newspaper would not have been simply a part of the school curricula, but instead a vehicle of public expression much like any commercial form of mass media.

The Court states that there was no intention on the part of the authorities of Hazelwood High School that the Spectrum be considered a public forum. "Board Policy," the majority decision states, was the guiding principle. "'[T]he legal, moral, and ethical restrictions imposed upon journalists within the school community'" were to be the ". . .lessons that were to be learned. . ." (268). In other words, the purpose of the school newspaper was for the education of the students in journalistic skills and responsibilities, not for the creation of a forum for student expression. While adding that the board policy also stated that "'[s]chool-sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism'" the majority decision emphasized that "such publications were 'developed within the adopted curriculum and its educational implications . . . One might reasonably infer from the [board policy] that school officials retained ultimate control over what constituted 'responsible journalism' in a school-sponsored newspaper" (269).

The second legal issue addressed in the majority decision is the question of the extent to which a school system is required to "tolerate particular student speech." (270). The decision made by the court rests on educational authority to determine both what constitutes speech which does not interfere with the school's function and the degree of toleration to be afforded student expression. "Educators are entitled to exercise greater control . . . to assure that participants learn whatever lessons the activity is designed to teach . . " (271).

The third legal issue deals with a fundamental controversy: Freedom of speech versus the right to privacy. The majority opinion is that Principal Reynolds "acted reasonably" in deleting the articles from the school newspaper on the belief that "the article was not sufficiently sensitive to the privacy interests" of the people involved (268). Reynolds' decision, the Court states, was grounded in the "legal, moral and ethical restrictions imposed upon journalists within [a] school community [which includes] the need to protect the privacy of the individuals whose most intimate concerns are to be revealed in the newspaper. . ." (268).

The majority opinion sets up two standards for student expression: Toleration of student speech and promotion of particular student speech. Toleration of student speech requires that the educator not ". . . silence a student's personal expression that happens to occur on the school premises." (271). This category of student expression is immune from school authority in that it does not conflict with or even fall under the heading of the educational mission of the school. The second category is student expression that occurs as part of the school's educational mission. "The latter question concerns educator's authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably to perceive to bear the imprimatur of the school" (271). This second category of student expression is under the authority of the school.

The authority granted to the school under this interpretation extends not only to student expression that may interfere with the educational mission of the school, but also to any expression that violates what the Court terms the "high standards" a school must demand of all its students. Schools may, therefore, refuse to allow student expression "that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences" (271). The Court goes on to provide examples of some forms of student expression that the school has both the right and the obligation to stifle. "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order'" (272).

There were predictable cries of outrage following *Hazelwood*, with commentators castigating the Court for narrowing the student free speech rights, so hard won in *Tinker*. But after all—these were high school students, minors, and high school students were different from consenting adults. Nothing like *Hazelwood* could happen to adults. That opinion, however, was not quite right.

Kincaid v. Gibson

A student and former student at Kentucky State University, Charles Kincaid and Capri Coffer, both of whom worked for the school yearbook and the school newspaper, brought action against the Kentucky State University administration, most notably Ms. Betty Gibson (Kincaid v. Gibson, 1996). Kincaid and Coffer claim that the 1992-94 yearbook was being withheld from distribution by the university because the university disagreed with the content and presentation of the yearbook. In addition, Kincaid and Coffer also claim that the university is attempting to control the content of the school newspaper, to "quell anything negative in the publications regarding Kentucky State University." Kincaid and Coffer claim that refusal by the administration to distribute the yearbook and the administration's interference with the newspaper violate both their

constitutional rights to freedom of speech and their contractual rights to receive the yearbook, which is supported in part b a mandatory student fee which both students claimed to have paid.

The specific complaint by the students was that:

> the ban of the yearbook and the control of the newspaper violate their First Amendment rights of speech and association. They also allege that the ban of the yearbook violates their Fourteenth Amendment rights of due process by depriving them of their property rights. Finally, they allege that the ban of the yearbook represents a breach of contract and an arbitrary and capricious governmental action (Kincaid, 1996).

The court had already addressed two of the claims, and found that the plaintiffs had not established a constitutionally protected right through paying the student fee, and that plaintiffs had no clear argument to support their claim of an infringement on freedom of association. The court was therefore left to decide only (1) the plaintiff's claim of a free speech violation concerning (1a) the newspaper and (1b) the yearbook, (2)a contractual violation under the student activity fee claim, and (3) the plaintiffs claim of arbitrary and capricious action by the defendants.

Findings

(1a) The court found no basis for a free speech violation concerning the newspaper. The court found that defendants had no standing to bring such a claim. There was no evidence to show that actual censorship ever took place, and even though the advisor to the newspaper was removed from that position, she was subsequently reappointed.

The plaintiff's legal argument rested on a citation from *Antonelli*. The plaintiffs cited this case in support of their claim that the threat of possible prior restraint is a sufficient claim to actual injury. The court disagreed, and argued that there was no real injury in this case: No attempt at censorship; no call fro prior review of the publication; no real showing of any type of past of possible future prior restraint.

(1b) The Court ruled that there was no first amendment violation concerning the yearbook because the yearbook was not a public forum. In a public forum or even a limited public forum[18], the state has little power to regulate speech, and can only do so by showing a "narrow and compelling" reason for the action. However, if there is not a public or limited public forum, the state can regulate speech simply by making a showing of reasonableness and that the regulation is not "merely because public officials oppose the speaker's point of view (Perry, 1983)"

Public Forum

In Bazaar v. Fortune (1973), the Court, commenting in the dicta, noted that it considered all university publications to be open fora, and therefore the state could only regulate such material according to the narrow and compelling interest standard. However, in *Hazelwood*, as noted above, the Supreme Court found that a high school sponsored publication designed as a part of the curriculum and the educational process was not a public forum. The key finding, according to Joseph Hood, the judge in the *Kincaid*, was "the intent of the publisher to create a public forum." In Hazelwood it was clear that the publisher did not intend to make the newspaper a public forum.

Following Hazelwood, in *Yeo* (1997), the First Circuit ruled that the advertising pages of a school yearbook were a limited pubic forum, in that those pages were opened

up to the public. The court in that case did also note that a yearbook in general is not considered a public forum. However, in *Planned Parenthood v. Clark*, the Ninth Circuit ruled that the advertising pages in school publications were not public fora, but were instead best considered as limited publications for a specific audience.

The court in the Kentucky case was more persuaded by the *Planned Parenthood* case than by the *Yeo* case, and even if *Yeo* was used, the Kentucky court could not find evidence that the yearbook was intended to be a public forum. Given that the Yearbook was not a public forum, the state merely had to meet the reasonable standard rater than the narrow and compelling interest standard. The court found that the state clearly met the reasonableness standard. Citing Hazelwood:

> "[A] school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," not only from speech that would substantially interfere with [its] work ... or impinge upon the rights of other students," but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices -- standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world -- and may refuse to disseminate student speech that does not meet those standards."

In sum, the Court in the Kentucky case applied the Hazelwood decision, a decision concerning a high school publication, to the case here, a case involving a university publication. Under this ruling, at least in Kentucky, universities are free to consider a school publication, possibly including newspaper, to be a part of a nonpublic forum, and therefore open to regulation by the administration.

Appellate Decision

This decision, which essentially applied *Hazelwood* to colleges and universities, was quickly appealed to the Sixth Circuit Court of Appeals in Cincinnati. In a 2-1 decision, the Circuit Court upheld the District Court's rulings on the lack of First Amendment rights for the students.

After citing a variety of appellate court opinions that provided robust first amendment protection to students, specifically student press, the court quickly came to its point. "The broad First Amendment protection afforded students by these cases has not proven to be without limit, however" (*Kincaid*, 1999). Citing *Hazelwood*, the court found that there was insufficient evidence that Kentucky State University (KSU) intended to create a public forum for the yearbook. Even after distinguishing from *Hazelwood*, in that there was no direct statement concerning the status of the yearbook, the court ruled that the onus was on the plaintiffs to prove the existence of a public forum. Without a public forum, school authority trumps student expression rights.

In a strange twist of common sense, the court supported its argument that the yearbook was not a public forum by noting that a disclaimer was printed in the yearbook stating that the yearbook was not an official publication of KSU, and that the views in the yearbook did not represent the university. Though such a disclaimer would seem to many

to be an indication that the yearbook was separate from the university, and therefore operating much more as a public forum, the court saw it as evidence of university control.

After dispensing with the claim of violation of First Amendment rights concerning the yearbook, the court went on to deal with the claim of a violation of First Amendment rights by KSU in attempting to control the student newspaper. The District Court had found that the plaintiffs lacked standing on this claim, as they could show no evidence that KSU had caused them injury. The appellate court agreed, declining to consider the merits of the claim (though noting that there appeared to be little merit).

The dissenting justice, R. Guy Cole, Jr., dissented in part concerning the appellate court's decision on the question of public forum. First, however, he questioned the court's reliance on *Hazelwood*, noting correctly that *Hazelwood* specifically applied to high schools, and that the Court in *Hazelwood* explicitly stated that they were not deciding the issues in the case relevant to a college or university setting.

Cole went on to note that even if *Hazelwood* applied to this case, the court erred in its application of the public forum argument. Cole notes that the regulations of the Student Publication Board, the university body that supervised all student publications including the yearbook, utilized language similar to that found in *Perry*, seeming to support a limited public forum. The Student Publication Board could make changes to student publications, but only as those changes dealt with the form, time or manner of publication, not the content. That language, coupled with the disclaimer in the yearbook suggested to Cole that the university intended to create a limited public forum with the yearbook, offering enhanced protection of student expression rights.

Dismay over this decision was prompt (Pease, 1999), noting the potential for increased restriction of student press rights at all colleges and universities. Though the decision applied only to those states under the jurisdiction of the 6th Circuit, decisions at the appellate level often carry weight in other jurisdictions. Apparently understanding the significance of this case, the 6th Circuit moved to hear this case *en banc* to fully consider the decision (November 29, 1999).

Urofsky

With *Kincaid* awaiting a full 6th Circuit hearing, the principles of *hazelwood* are not yet being applied to colleges and universities. One other case, especially in conjunction with *Kincaid*, has the potential to much more greatly restrict not only student expression rights but expression rights in colleges and universities in general.

Melvin Urofsky, a constitutional historian at Virginia Commonwealth University, in Richmond, Virginia, is lead plaintiff in a case challenging a Virginia law which which restricts the ability of state employees to access sexually explicit material on state-owned or leased computers. Urofsky and the other plaintiffs contend the law violates their First Amendment rights and restricts what and how they teach and conduct research. The law does not completely prohibit access to such material; instead, it requires prior approval to access such material for "bona fide" research activities.

A District Court in Virginia found the law unconstitutional (Urofsky v. Allen, 1998) on several grounds. First, District Judge Leonie M. Brinkema argued that the appropriate test for determining if the state unconstitutionally restricted state employee speech would be an application of the *Pickering/NTEU* test. This test would require a higher standard of scrutiny for speech that is restricted, most specifically requiring the state to establish that "the interests of both potential audiences and a vast group of present

and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." (NTEU, 513 U.S. at 468 (quoting Pickering, 391 U.S. at 571)). Additionally, since the Virginia law specifically targeted sexually explicit speech, content regulation, the state law faces even greater scrutiny, requiring the state to "demonstrate a compelling interest" with "narrowly tailored" restrictions (Urofsky, 1998).

The District Court ruled that the Virginal law was unconstitutional in that it was both "underinclusive," in that it targeted only sexually explicit speech and not any and all other forms of speech which may cause a material disruption to the workplace, and "overinclusive," in that it too broadly restricts activities related to the workplace and professional needs of state employees.

Virginia appealed the decision to the 4th Circuit Court. The three-judge panel voted unanimously to overturn the District Court decision (Urofsky, 1999). Writing for the court, Justice Wilkins argued that the law was constitutional in that it did not infringe upon rights granted to individuals and protected by the First Amendment. Instead, the law only applied to work done by state employees using state-owned equipment. The correct balancing test, Wilkins argues, is to balance the right of the employee *as citizen* (author emphasis against the right of state as employer to determine working regulations. If employee speech 'touches upon a matter of public concern, and, if so, whether the employee's interest in First Amendment expression outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace is the key inquiry. If speech touches upon a public interest, then restriction is much more difficult, because it restricts a citizen's right to speak, but if the speech does not touch upon a matter of public interest, there is no violation of a citizen's rights. (Connick).

The speech in this case, the court found, does not touch upon public matters. "The challenged aspect of the Act does not regulate thespeech of the citizenry in general, but rather the speech of state employees in their capacity as employees" (Urofsky, 1999). Given this finding, there is no unconstitutional restriction.

Petitioned for an *en banc* rehearing, the entire 4th Circuit heard the case and issued a decision on June 23, 2000 (Urofsky, 2000). In an 8-4 decision, the court upheld the three-judge panel and found that the Virginal law was not an unconstitutional infringement on free speech.

The decision essentially reargued the themes from the three-judge panel. In the language of the decision, however, is an important phrase that, taken with the decision in *Kincaid*, leads to the potential for serious infringements of freedom of speech on the college and university campus:

> Appellees maintain that by requiring professors to obtain university approval before accessing sexually explicit materials on the Internet in connection with their research, the Act infringes this individual right of academic freedom. Our review of the law, how- ever, leads us to conclade that to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act (Urofsky, 2000)

This language, and the following discussion of academic freedom, creates a picture of courts increasingly willing to restrict not only the speech rights of students if they express themselves in form or content opposed by university authorities, but also the expression of faculty. Both students and faculty are under the authority of the university: students because they are engaged in educational activities, not public activities, and faculty because, as state employees, they have no especial right o academic freedom. If academic freedom exists, it is a right granted to institutions to be doled out, not to individuals to be expressed.

Academic freedom, as noted in the decision, has always been at best a nebulous concept (Hofstadter and Metzger, 1955; Sandmann, 1998). What is important here is the court's equating of any possible legal protection of academic freedom (other than protections of academic freedom which may exist in collective bargaining agreements between faculty and an institution) with the institution. Following the reasoning in *Urofsky*, if a state university decreed that certain subjects were not to be discussed or taught (such as the use of fetal stem cells, to grab one potentially controversial topic) because they were in opposition to the wishes of the university and the state, the state would have that authority as that would be a workplace restriction, not a "public matter" restriction.

Now that may be a great leap, noting that the Virginia law is aimed at a form of expression that also has limited First Amendment protection. Nevertheless, the directions the courts are taking in restricting student expression and restricting faculty expression bear a close watch in a legal climate that seems to be more deferential to majoritarian wishes day by day.

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